Supreme Court, U.S.
FILED
DEC 28 1992
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92-1211
NO.

In the
Supreme Court of the United States

OCTOBER, TERM, 1992

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
Petitioner

VERSUS

CURTIS CAMPO, JR.
Petitioner

AND

ELECTRO-COAL TRANSFER CORPORATION, INC.
Respondent

SECOND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2511

QUESTIONS PRESENTED FOR REVIEW

Has the Fifth Circuit in reaffirming the district Court's grant of a directed verdict ignored or misconstrued the mandate of this Court issued on January 13, 1992 vacating the Fifth Circuit's prior decision and remanding Campo for further consideration in light of *Southwest Marine, Inc. v. Gizoni* 112 S.Ct. 486?

Did this Court in vacating the Fifth Circuit's prior ruling in its entirety conclude from the facts recited by the Fifth Circuit from the record that there were indeed substantial issues of fact over which reasonable minds applying the proper legal standard could differ so that trial by jury and not directed verdict was the proper legal method of disposition?

Is petitioner, Curtis Campo, who was denied his right to trial by jury as a matter of law because he was engaged in one of the occupations listed in the Longshore and Harbor Workers' Act pursuant to *Pizzitolo v. Electro-Coal Transfer Corporation*, 812 F.2d 769 which was overruled by this Court in *Southwest Marine v. Gizoni*, 112 S.Ct. 486 *now* entitled to his right to trial by jury?

Did the Fifth Circuit have the discretion to ignore the mandate of the United States Supreme Court?

Did the Fifth Circuit on remand have the discretion to reweigh evidence which had never been presented to the jury so as to to affirm its prior correctness on factual findings and to apply conclusions never considered in its original opinion?

QUESTIONS PRESENTED FOR REVIEW (continued)

Must a claimant who is injured in the service of a specific vessel owned by his employer to which vessel he was assigned for the specific mission of the vessel to perform work which contributed to the mission of the vessel prove attachment to a fleet of vessels under this Court's rulings in *Desper v. Starved Rock*, 72 S.Ct. 807 and *McDermott International v. Wilander*, 111 S.Ct. 807?

Is the Fifth Circuit's relatively new time test of seaman status the *Robison-Barrett* rule (a combination of *Offshore Company v. Robison*, 266 F.2d 769, and *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067) in conflict with this Court's decisions in *Desper* and *Wilander* or was *Barrett* impliedly overruled by *Wilander*?

LIST OF PARTIES

The following are the parties to this proceeding:

Curtis Campo
Plaintiff-Petitioner

Electro-Coal Transfer Corporation
Defendant-Respondent

National Union Fire Insurance Company
of Pittsburgh, PA
Intervenor-Petitioner[1]

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Geroge R. Alvey, Jr.
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[1] American International Group is the parent company of National Union Fire; there are no subsidiaries of National Union Fire.

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TABLE OF AUTHORITIES

Intervenor-petitioner, National Union Fire, adopts the authorities set forth in the Second Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, which appear at pages vi and vii thereof.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1992

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

Intervenor-Petitioner

VERSUS

CURTIS CAMPO, JR.

Plaintiff-Petitioner

AND

ELECTRO-COAL TRANSFER CORPORATION, INC.

Defendant-Respondent

SECOND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 28, 1992.

DECISIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are reported as follows:

Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992) (Campo II)

Campo v. Electro-Coal Transfer Corp., 955 F.2d 10 (5th Cir. 1990) (Campo I)

and are reproduced in Appendix A and Appendix E, respectively.

JURISDICTION

This Petition seeks review of the second decision of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 28, 1992, on remand by this Court. Petitioner, Curtis Campo, thereafter petitioned the Court for rehearing, and on October 16, 1992, the Court of Appeals denied Mr. Campo's request for rehearing.

This Petition is timely filed pursuant to Rule 13.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Intervenor-Petitioner, National Union Fire, here adopts by reference the "statutes presented for review" portion of the Second Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, Jr., appearing at page 2 thereof.

STATEMENT OF THE CASE

The original Complaint of the plaintiff, Curtis Campo, was filed in the United States District Court for the Eastern District of Louisiana on January 25, 1989. The defendant, Electro-Coal Transfer Corporation, answered on

March 22, 1989. National Union Fire intervened in order to assert its lien for workers' compensation benefits paid to or on behalf of Curtis Campo.

The case proceeded to trial with a jury on September 27, 1989, and continued through September 28, 1989. On Motion of defendant, Electro-Coal Transfer Corporation, the District Court entered a directed verdict, holding that Curtis Campo was a longshoreman and not a seaman as had been alleged. On the basis of this holding, the case was dismissed. The District Court's judgment was appealed by the plaintiff, Curtis Campo, to the United States Court of Appeals for the Fifth Circuit, and again National Union Fire intervened. The Court of Appeals affirmed the District Court by its Judgment entered on July 23, 1989. Mr. Campo petitioned for rehearing, which was denied on September 7, 1990.

The plaintiff, Curtis Campo, and intervenor, National Union Fire, filed Petitions for Writs of Certiorari in the Supreme Court of the United States, which granted a writ on January 13, 1992, vacating the decision of the United States Court of Appeals for the Fifth Circuit and remanding the case to said Court for consideration in light of *Southwest Marine v. Gizoni*, 112 S.Ct. 486 (1991).

On remand, the United States Court of Appeals for the Fifth Circuit again affirmed the decision of the United States District Court. The plaintiff-petitioner, Curtis Campo, filed an Application for Rehearing, which was denied on October 16, 1992. The plaintiff-petitioner, Curtis Campo, filed his Second Petition for Writ of Certiorari in this Court on November 27, 1992. Intervenor-petitioner, National Union Fire, hereby files its Second Petition for Writ of Certiorari.

REASONS WHY WRIT SHOULD BE GRANTED AND ARGUMENT

Intervenor-petitioner, National Union Fire, here adopts by reference the reasons why writ should be granted and argument in support thereof found at pages 13 - 25 of the Second Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, Jr.

CONCLUSION

Intervenor-petitioner, National Union Fire, files this Second Petition for Writ of Certiorari in order to preserve its right of recovery of benefits paid to or on behalf of plaintiff-petitioner, Curtis Campo, Jr., by National Union Fire pursuant to the provisions of the Longshore and Harbor Workers Compensation Act.

Respectfully submitted:

KATHLEEN K. CHARVET
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COMPANY OF PITTSBURGH, PA

PROOF OF SERVICE

I, David L. Barnett, attorney for intervenor-petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Second Petition for Writ of Certiorari on:

Mr. George R. Alvey, Jr.
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
New Orleans, LA 70170
Telephone: (504) 582-8000
ATTORNEY FOR DEFENDANT-RESPONDENT

Ms. Evangeline M. Vavrick
912 Louisiana Avenue
New Orleans, LA 70115
Telephone: (504) 899-5555
ATTORNEY FOR PLAINTIFF-PETITIONER

by mailing a copy thereof, postage pre-paid and addressed to their respective offices, this 23rd day of December, 1992.

_____

DAVID L. BARNETT

APPENDIX A

Curtis CAMPO,
Plaintiff-Appellant,

v.

ELECTRO-COAL TRANSFER CORP.,
Defendant-Appellee.

No. 89-3738

United States Court of Appeals,
Fifth Circuit.

Aug. 28, 1992.

Worker injured while unrolling barge cargo cover at cargo transfer terminal brought claim under Jones Act. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., granted directed verdict for employer on issue of Jones Act seaman status. The Court of Appeals affirmed without opinion, 909 F.2d 1480, and later issued opinion, 955 F.2d 10, holding that worker was foreclosed from seeking Jones Act seaman status since worker was engaged in occupation expressly enumerated in Longshore and Harbor Workers' Compensation Act. Appeal was taken and the Supreme Court, 112 S.Ct. 858, vacated judgment. On remand, the Court of Appeals, Jerry E. Smith, Circuit Judge, held that worker was not assigned to a fleet of vessels, as needed to establish seaman status under Jones Act.

Affirmed.

Evangeline M. Vavrick, New Orleans, La., for plaintiff-appellant.

Kathleen K. Charvet, McGlinchey, Stafford, Cellini & Lang, New Orleans, La., for intervenors Nat. Union Fire Ins. Co. of Pittsburgh, Pa.

George R. Alvey, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, La., for defendant-appellee.

Lance S. Ostendorf, David L. Barnett, New Orleans, La., for intervenor-Nat'l Union.

On Remand from the Supreme Court of the United States.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This court previously affirmed the district court's entry of a directed verdict against plaintiff Curtis Campo.[1] Our earlier opinion relied upon *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir.1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), the reasoning of which was rejected in *Southwest Marine v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). The Supreme Court vacated our opinion in *Campo I*, directing us to reconsider in light of *Southwest Marine*. We do so now and affirm on grounds different from those in our prior opinion.

---

[1] *Campo v. Electro-Coal Transfer Corp.*, 955 F.2d 10 (5th Cir.1990) (hereinafter *Campo I*) *vacated*, ___ U.S. ___, 112 S.Ct. 858, 116 L.Ed.2d 766 (1992).

I.

Campo was employed by Electro-Coal Transfer Corp. (Electro-Coal) at its cargo transfer terminal on the Mississippi River. He was injured while unrolling a barge cargo cover[2] and brought suit against Electro-Coal under the Jones Act, 46 U.S.C.App. § 688.

After hearing Campo's evidence of his seaman status, the district court directed a verdict in favor of Electro-Coal. The court first held that no reasonable jury could find that Campo was a seaman, as he could not show a permanent assignment to or substantial work on, a fleet of vessels. Relying upon *Pizzitolo,* the court also found that Campo was not a seaman as a matter of law because his job was specifically enumerated in the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(3). We affirmed on the basis of the court's second line of reasoning, finding that *Pizzitolo* controlled the outcome. *See Campo I,* 955 F.2d at 12.

II.

[1] *Southwest Marine* overruled *Pizzitolo. Easley v. Southern Shipbuilding Corp.,* 965 F.2d 1, 3 (5th Cir.1992). We therefore must examine that portion of the district court's ruling that did not rely upon *Pizzitolo.* On motions for directed verdict, we consider all of the evidence, not just that which supports the nonmovant's case, in the light and with all reasonable inferences most favorable to the nonmovant. *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir.1969) (en banc).

---

[2] A detailed description of the facts of this case may be found in *Campo I,* 955 F.2d at 11-12.

[2] In order to bring a claim under the Jones Act, Campo must show that (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet and (2) his work contributed to the mission of the vessel or fleet. *See Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir.1986) (en banc); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir.1959).

[3] Whether the plaintiff relies upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the *Robison/Barrett* test. *See Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d 307, 310-311 (5th Cir.1984); *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.1981)("[t]he key is that there must be a relationship between the claimant and... [an] identifiable group of vessels"), *cert. denied*, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981). A fleet is "an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." *Barrett*, 781 F.2d at 1074.

[4] Campo has failed to identify a group of vessels to which he was permanently assigned or on which he performed a substantial amount of work. Campo describes a six-or seven-thousand-vessel fleet composed of the small number of Electro-Coal vessels, river barges owned by Mid-South Towing, and ocean barges owned by Gulf Coast Transit.

[5] This grouping fails as a fleet for two reasons. First, Campo did not establish common control of these three groups of vessels.[3] Second, Campo was randomly

[3] Counsel for Campo attempted to introduce a promotional film produced by Tampa Electric Company. Counsel never explained to the court

assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies.[4] It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. *See, e.g., Langston v. Schlumberger Offshore Servs.*, 809 F.2d 1192, 1194 (5th Cir.1987); *Buras*, 736 F.2d at 310; *Guidry*, 640 F.2d at 529.

Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman. The court properly granted a directed verdict in favor of Electro-Coal.

III.

Campo also has raised several evidentiary and procedural points of error. We reject these arguments for the reasons set out in the prior opinion. *See Campo I*, 955 F.2d at 12. The intervention of National Union Fire Insurance is dismissed as moot.

AFFIRMED.

(footnote 3 continued)

that the purpose of this evidence was to prove common control of the vessels owned by Electro-Coal, Mid-South, and Gulf Coast. Nor would the promotional video, without more, have served to establish such common control.

[4] Campo seems to suggest that Electro-Coal controlled all the ships that used its terminal in that it directed the cargo operations. But "control" encompases more than a temporary authority to perform an isolated task on a vessel.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
OCT 16, 1992

No. 89-3738

CURTIS CAMPO,
Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(October 16, 1992)

Before Politz, Chief Judge, Smith and Barksdale, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.
ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
AUG 28, 1992

No. 89-3738

D.C. Docket No. CA 89 351G

CURTIS CAMPO,

Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

August 28, 1992

ISSUED AS MANDATE:

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 13, 1992

Ms. Evangeline Vavrick
912 Louisiana Avenue
New Orleans, LA 70115

Re: Curtis Campo, Jr.
v. Electro-Coal Transfer Corporation, Inc.
No. 90-722
National Union Fire Insurance Company of Pittsburgh, Pennsylvania
v. Curtis Campo, Jr., et al.
No. 90-956

Dear Ms. Vavrick:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Southwest Marine, Inc. v. Gizoni, 502 U.S. -----(1991).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER, Clerk

APPENDIX E

Curtis CAMPO, Plaintiff-Appellant,

v.

ELECTRO-COAL TRANSFER CORPORATION, Defendant-Appellee.
No. 89-3738
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
July 23, 1990.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., which granted directed verdict for employer on issue of Jones Act seaman status. The Court of Appeals affirmed without opinion, 909 F.2d 1480, and subsequently issued opinion with Duhe', Circuit Judge, holding that because worker was engaged in occupation expressly enumerated in Longshore and Harbor Workers' Compensation Act, he was foreclosed from seeking Jones Act seaman status.

Affirmed.

Certiorari granted and judgment vacated, 112 S.Ct. 858.

Evangeline M. Vavrick, New Orleans, La., for plaintiff-appellant.

George R. Alvey, Jr., Edith B. Clement, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, La., for defendant-appellee.

Lance S. Ostendorf, David L. Barnett, New Orleans, La., for intervenor-Nat'l Union.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WILLIAMS, SMITH and DUHE', Circuit Judges.

DUHE', Circuit Judge.

In this maritime personal injury suit Curtis Campo appeals the district court's grant of directed verdict on the issue of Jones Act seaman status. Finding that Campo is foreclosed from seeking Jones Act seaman status because he is covered under the Longshore and Harbor Workers' Compensation Act (the LHWCA), we affirm.

[1,2] On motions for directed verdict we consider all of the evidence, not just that which supports Campo's case, in the light and with all reasonable inferences most favorable to Campo. If the facts and inferences point so strongly and overwhelmingly in favor of Electro-Coal that reasonable men could not arrive at a contrary conclusion, the directed verdict was proper. However, if there is

substantial evidence opposed to the motion, the motion for directed verdict should have been denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question. *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

Campo was employed by Electro-Coal Transfer at its cargo transfer terminal on the Mississippi River. Electro-Coal employees are divided into two categories, the operations division and the harbor boat division. Employees of the harbor boat division are specifically assigned to one of Electro-Coal's four harbor tugs. The operations department personnel board tugs, barges, and special purpose vessels to position barges and to assist the harbor tugs in opening and closing barge roll-top covers used to protect cargo in the barges. Generally, operations department employees are shoreside dock workers whose main function is to facilitate the loading and unloading of cargo.

Campo worked in the operations division as an operator/trainee and spent most of his time operating a continuous bucket unloader, a machine located on the dock and designed to remove cargo from barges. Campo's position required that he conduct general housekeeping duties aboard the barges. Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep the barges clean, to ensure that the barges did not take on water, to pump ballast, and to maintain the hydraulic winches to which the river barges to be loaded and unloaded are attached. In a 12 hour shift Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. Campo also assisted harbor tugs in making and breaking tows, spotting river barges, and opening roll-top

covers of barges. In his eight years of employment with Electro-Coal, Campo substituted as a deckhand on a harbor vessel only twice. Beyond this, any activity performed by Campo while on any vessel was for the sole purpose of facilitating cargo operations.

[3] Campo was injured when he fell into a barge which was moored at the dock and being prepared to take on cargo. A tug was positioned on one side of the barge, and a line stretched between Campo and the tug was attached to the cover to roll it open. When the cover was opened Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, it either jostled the barge or Campo misstepped, causing Campo to fall into the barge's hold.

In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), we held that coverage under the LHWCA precluded a finding of Jones Act seaman status. *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039, 1040 (5th Cir.1987). Section 902(3) of the LHWCA defines an "employee" covered under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker...." Campo's employment duties involved the loading and unloading of cargo, traditional long-shoring activities. *Durr v. Global Marine, Inc.*, 673 F.2d 740, 741 (5th Cir.1982). Because Campo was engaged in an occupation expressly enumerated in the LHWCA, the district court properly granted a directed verdict in favor of the defendant.

[4] We find Campo's remaining arguments unavailing. Campo first contends that the district court abused its descretion by holding the pre-trial conference on the Friday before jury selection began on Monday. However, Campo fails to point to any prejudice resulting from the timing of the pre-trial conference; in addition, if Campo were surprised by what transpired at the conference, his remedy was to have moved for a continuance. Having failed to do so, Campo waived the right to assert this alleged error on appeal.

[5] Campo also contends that the district court abused its discretion in condemning him to pay Electro-Coal's costs for duplicate copies of depositions of its employees taken by Campo. The law is clear that the court's order was proper because the copies were necessarily obtained for use in the case. *See West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1237-38 (5th Cir.1988). Campo's two final points, that the court erred in excluding certain evidence and in limiting the consideration of Campo's employment duties to the two years directly preceding the accident, are rendered moot because the court considered all of the evidence before him in granting the directed verdict.

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED.

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

NOs. 92-943 & 92-1211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CAMPO, JR.
Plaintiff-Petitioner,

versus

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor-Petitioner

versus

CURTIS CAMPO, JR., PLAINTIFF-PETITIONER, AND ELECTRO-COAL TRANSFER CORPORATION, INC.,
Defendant-Respondent

On Petitions for Writs of Certiorari To The United States Court of Appeals For The Fifth Circuit

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Respondent's Consolidated Brief in Opposition To Petitions for Certiorari

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20 pp

QUESTIONS PRESENTED

Petition Nos. 92-943 and 92-1211 present identical questions arising from the same case:

I. Whether the questions presented by Petitioners merit review under Rule 10 of the Supreme Court of the United States.

II. Whether the Circuit Court of Appeals for the Fifth Circuit was correct in affirming the district court's directed verdict in favor of Respondent on the issue of Petitioner Campo's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C. § 688.

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STATEMENT OF THE CASE

Curtis Campo, Jr., Petitioner, brought suit for personal injuries against his employer, Electro-Coal Transfer Corporation ("Electro-Coal"), under the Jones Act, 46 U.S.C. § 688, and the general maritime law. After hearing all of Campo's evidence on the issue of seaman status, the United States District Court for the Eastern District of Louisiana entered a directed verdict in favor of Electro-Coal. Construing all evidence in favor of Petitioner, the district court concluded that Petitioner was not a seaman under the Jones Act. This determination was affirmed by the United States Court of Appeals for the Fifth Circuit on grounds that Campo was not a seaman because he was not permanently assigned to a vessel or an identifiable fleet of vessels and because Campo was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. Appendix at A-11.[1] This Court subsequently vacated the first panel decision and remanded the case to the Fifth Circuit for reconsideration in light of Southwest Marine, Inc. v. Gizoni, _____ U.S. _____, 112 S.Ct. 486 (1991). Appendix at A-10. On remand the Fifth Circuit concluded that Campo was not a seaman under the Jones Act because he was not permanently assigned to a vessel or an identifiable fleet of vessels. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992); Appendix at A-1.

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[1] Petitioners in Nos. 92-943 and 92-1211 filed identical Appendices with the same pagination. The opinions of this Court and the Court of Appeals are reproduced therein. Citations are to Petitioners' Appendices at A-_____. Petitioner National Union Fire Insurance Company is the Longshore compensation insurer of Electro-Coal and filed an Intervention in the lower court.

The uncontested facts established that Campo was a shore-based terminal worker who assisted in loading and unloading bulk cargo at Electro-Coal's terminal in Plaquemines Parish, Louisiana. Electro-Coal's facility is used to transfer and store coal and other cargo. The terminal in question consists of shore-side buildings, a coal storage area, and a dock. Electro-Coal routinely transfers coal from vessel to vessel and between vessels and the shore-side storage area. Barges loaded with coal and other cargo to be discharged are routinely tied to the dock adjacent to the terminal. The cargo is then loaded either on to other barges or sea-going vessels, or stored in Electro-Coal's terminal. Cargo is loaded and unloaded by use of large electric-powered machines, various cranes, and a series of powered conveyor belts.

Electro-Coal's terminal workers are divided into two divisions, an operations division and a harbor boat division. Campo was assigned to the operations division and was classified as an operator trainee at the time of his accident. The operations division consists of shore-based dock workers who are involved with the handling, loading and unloading of cargo. Appendix at A-12-A-13. Campo's primary duties concerned the operation of the different types of equipment used in the cargo transfer process. This equipment is located on the dock and on land. To operate the machinery Campo would sit in the cab of a crane, above the dock, and pull various levers to move cargo on to conveyor belts or to allow the cargo to be let out of the machines into the barge.

The harbor boat division at Electro-Coal consists of a foreman, tug boat operators and deckhands who are permanently assigned to specific vessels. Campo was not assigned to this division. The harbor boat division runs and maintains Electro-Coal's four harbor boats. No evidence was presented suggesting

that Campo was permanently assigned to work aboard any of these vessels as a member of the crew. Appendix at A-4.

Like other marine terminals, thousands of barges and vessels call annually at the Electro-Coal facility to discharge or to load cargo. These cargo-carrying vessels, both river and ocean-going, are owned and operated by many different companies. None of the cargo-carrying vessels are owned by Electro-Coal, with the exception of a single barge, which is used for maintenance and clean up work.

In order to facilitate loading and unloading operations, Campo occasionally boarded barges, removed hatch covers, pumped ballast, and caught and released lines. Campo, however, admitted that these activities were for the sole purpose of facilitating the loading and unloading of cargo. Appendix at A-13. Campo spent most of his time operating a continuous bucket loader, a machine located on the dock and designed to remove cargo from barges. Appendix at A-13.

Campo was injured on a barge, moored at a dock, which he was temporarily aboard to prepare it to take on cargo. Appendix at A-13. A tug was positioned alongside the barge. A line from the tug was used to open a hatch cover on the barge. After the cover was opened, Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, Campo somehow fell into the barge's cargo hold. Appendix at A-13. There was no evidence or proof that Campo was permanently assigned to the tug, or any other vessel, as a crew member nor did Campo perform a substantial amount of his work on vessels. Appendix at A-4-A-5.

Campo brought suit against Electro-Coal under the Jones Act, contending that he was a "seaman." Electro-Coal defended contending, inter alia, that Campo, a shore-based terminal worker assisting in the loading and unloading of vessels, was not a Jones Act seaman, since he was not permanently assigned to any vessels or an identifiable fleet of vessels owned or controlled by Electro-Coal. The district court directed a verdict in favor of Electro-Coal at the close of Campo's case. This determination was affirmed by the Circuit Court of Appeals for the Fifth Circuit. Appendix at A-11. The U.S. Supreme Court vacated the first panel decision of the Fifth Circuit and remanded the case for reconsideration under this Court's decision in Southwest Marine, Inc. v. Gizoni, ____ U.S. ____, 112 S.Ct. 486 (1991) Appendix at A-10. On remand, the Fifth Circuit followed this Court's decisions in Gizoni and McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807 (1991). The Fifth Circuit applied the test of seaman status articulated in Wilander and in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), instead of relying upon Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988), and concluded that Campo was not a seaman. Appendix at A-1; Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992).

ARGUMENT

I. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

The questions raised by Petitioners do not merit review nor do Petitioners articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States

to support their argument that this Court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented by Petitioners relate solely to factual issues, and do not present substantial issues of law as required by Rule 10. The court of appeals' decision is not in conflict with a decision of this Court or of another federal circuit court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. In fact, as shown below, the decisions of the lower courts are in full accord with the Jones Act and the precedents of this Court.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it affects them as litigants and are attempting to re-argue the case which Petitioners lost below on undisputed facts. This Court has stressed that it does not "sit for the benefit of particular litigants." Rice, 349 U.S. at 74.

II. THE COURTS BELOW CORRECTLY APPLIED THE JONES ACT AND THE PRECEDENTS OF THIS COURT IN FINDING THAT CAMPO IS NOT A SEAMAN.

In Wilander, this Court emphasized that "The key to seaman status is employment-related connection to a vessel." 498 U.S. at _____, 111 S.Ct. at 817. The evidence establishes that Campo, a shore-based crane operator at a marine terminal, was not permanently assigned to a vessel or an identifiable fleet of vessels and therefore lacked seaman status. Following remand from this Court and oral argument by the parties, the Fifth Circuit concluded:

> Campo has failed to identify a group of vessels to which he was permanently assigned or on which he performed a substantial amount of work. Campo describes a six-or-seven-thousand-vessel fleet composed of the small number of Electro-Coal vessels, river barges owned by Mid-South Towing, and ocean barges owned by Gulf Coast Transit.
>
> This grouping fails as a fleet for two reasons. First, Campo did not establish common control of these three groups of vessels. Second, Campo was randomly assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies. It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. See, e.g. Langston v. Schlumberger Offshore Servs., 809 F.2d 1192, 1194 (5th Cir. 1987); Buras, 736 F.2d at 310; Guidry, 640 F.2d at 529.

> Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman. The court properly granted a directed verdict in favor of Electro-Coal.

Appendix at A-4; Campo II, 970 F.2d at 52-53 (footnotes omitted).

Unlike Gizoni, Campo was given every opportunity at the district court level to demonstrate that he might be entitled to Jones Act coverage. After presenting all of his evidence in support of his claim for seaman status, Campo was unable to show a relationship to an identifiable fleet of vessels and the district court granted a directed verdict in favor of Electro-Coal. On reconsideration in light of Gizoni, the Fifth Circuit in Campo II affirmed the district court's holding that "[n]o reasonable jury could find that Campo was a seaman, as he could not show a permanent assignment to, or substantial work on, a fleet of vessels." Campo II, 970 F.2d at 52; Appendix at A-3. The Fifth Circuit correctly upheld the district court's application of Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959), and Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), which require a party claiming seaman status to show:

1. He was permanently assigned to a vessel or performed a substantial part of his work on a vessel or an identifiable fleet of vessels; and

2. His work contributed to the mission of the vessel or fleet;

Barrett, 781 F.2d at 1074-76.

The case of Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991), supports the soundness of this conclusion by having emphasized: "A large body of law, developed through a case-by-case application of the Robison test, provides the means for deciding which workers are entitled to the benefits of the Jones Act. Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels." Bach, 920 F.2d at 326 (emphasis added). In Bach II, 947 F.2d 1290, the Fifth Circuit reinstated the Bach I opinion following remand from this Court.

In Wilander, this Court examined the soundness of the Robison test and found it to be the appropriate standard for determining Jones Act seaman status. This Court cited language from Maryland Casualty Company v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938), that "there is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise." 498 U.S. at ___, 111 S.Ct. at 817. Campo put forth no evidence from which a jury could infer that he was permanently assigned to a vessel or an identifiable fleet of vessels. The Fifth Circuit's upholding of the district court's granting of a directed verdict in favor of Electro-Coal is in accordance with this Court's decisions in Gizoni and Wilander. Campo does not qualify as a Jones Act seaman and the district court properly granted a directed verdict in favor of Electro-Coal.

A. THE QUESTION OF SEAMAN STATUS UNDER THE JONES ACT IS A MIXED QUESTION OF LAW AND FACT.

Petitioners incorrectly suggest that the question of seaman status always should be the exclusive province of the jury. Petitioners completely ignore the purpose of a directed

verdict. In Jones Act cases, "a mere scintilla" of evidence is insufficient to present a question for a jury and there must be a conflict in substantial evidence to create a jury question. A directed verdict is appropriate where there is a complete absence of probative facts supporting plaintiff's position. See, e.g., Landry v. Huthnance Drilling Company, 889 F.2d 1469, 1470 (5th Cir. 1989); Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980).

The right to a jury trial does not negate the authority of federal courts to direct a verdict or enter a judgment notwithstanding the verdict for insufficiency of evidence. Galloway v. United States, 319 U.S. 372, 389 (1943) (federal courts have power to direct verdict for insufficiency of evidence even though claimant has right to jury trial); Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 333-35 (1979)(offensive use of collateral estoppel does not violate defendant's right to trial by jury). Petitioners' arguments ignore this Court's recognition that it is proper to direct a verdict when, under the governing law, "there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). In Anderson, this Court noted that judges are not "required to submit a question to the jury...unless the evidence is of such a character that it would warrant the jury finding a verdict in favor of that party." 477 U.S. at 251 (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). Campo put forth no evidence from which a jury could have inferred that he was permanently assigned to a vessel or fleet of vessels.

In Wilander, this Court stated: "[w]e note that the question of who is a 'member of a crew,' and therefore who is a 'seaman,' is better characterized as a mixed question of law and fact. When the underlying facts are established and the rule of

law is undisputed, the issue is whether the facts meet the statutory standard. See Pullman-Standard v. Swint, 456 U.S. 273, 289, n.19, 102 S.Ct. 1781, 1790, n.19, 72 L.Ed.2d 66 (1982)(defining a mixed question)." Wilander, 498 U.S. at _____, 111 S.Ct. at 818.

This Court went on to note that "member of a crew" and "seaman" are statutory terms and therefore their interpretation would be a question of law. The Court specifically addressed the appropriateness of directed verdicts in Jones Act cases: "Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law would reasonably support only one conclusion." Wilander, 498 U.S. at ____, 111 S.Ct. at 818 (citing Anderson v. Liberty Lobby Inc., 477 U.S. 243, 248 (1986)). Accordingly, the Fifth Circuit did not err in upholding the district court's granting of a directed verdict on the question of seaman status.

Petitioners also suggest that the Supreme Court rejected the applicability of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969). Campo gives no authority for this bold assertion that this Court rejected the application of Boeing. This argument is pure conjecture and is entirely unsupported by the case law and the record. The district court correctly applied the legal standard for granting a directed verdict, which is the standard of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) because Campo failed to introduce substantial evidence over which reasonable minds could differ that he was not permanently assigned to an identifiable fleet of vessels.

B. BARRETT v. CHEVRON U.S.A., INC. WAS NOT OVERRULED BY THIS COURT.

Campo concludes that Wilander somehow impliedly overrules the Robison/Barrett test for determining seaman status. The Wilander decision is totally devoid of any language which can be construed to overrule Barrett. Wilander was essentially concerned with the second prong of the seaman status test "that the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission" and not with the first prong of the test which is the prong which was the subject matter of Barrett and this case.

Campo was not a Jones Act seaman because he could not establish a permanent connection to a vessel or an identifiable fleet of vessels. Therefore Campo could not satisfy the first prong of the Robison test, without regard to the Barrett decision's "time test." The "time test" of Barrett simply was not at issue and not relied upon by the lower courts in reaching their conclusions. The Fifth Circuit in Campo II concluded: "Whether the plaintiff relies upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the Robison/Barrett test." Appendix at A-3; Campo II 970 F.2d at 52.

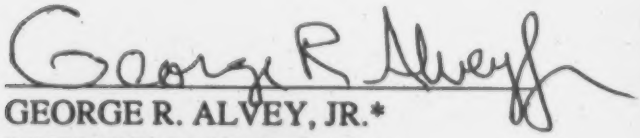
C. CAMPO'S RELIANCE ON PIZZOTOLO IS MISPLACED.

Campo attempts to go beyond the record before this Court to establish facts by relying on the case of Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988). In Gizoni, this Court overruled Pizzotolo which was recognized by the Fifth Circuit in Campo II. Accordingly, any reliance on the facts set forth in Pizzotolo as an attempt to show Campo's assignment to a fleet of vessels is inappropriate and should not be before this Court.

CONCLUSION

The questions presented by the Petitioners do not merit review because, as a matter of law and fact, Campo was not a Jones Act seaman since he was not permanently assigned to a vessel or an identifiable fleet of vessels. The decisions of the lower courts correctly apply the Jones Act and the United States Court of Appeal for the Fifth Circuit correctly applied the precedents of this Court in Gizoni and Wilander. Accordingly, Petitioners' second petitions for writs of certiorari to review the second decision of the United States Court of Appeal for the Fifth Circuit should be denied.

Respectfully submitted,



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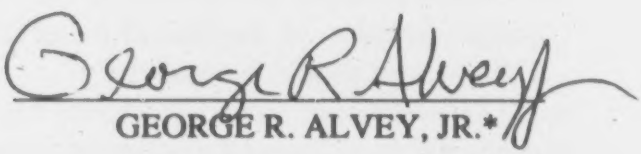
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for all parties by placing same into the United States Mail or Hand Delivery on this the 28th day of January, 1993.



GEORGE R. ALVEY, JR.*

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APPENDIX A

APPENDIX: Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.1:

Electro-Coal Transfer Corporation
TECO Energy, Inc.